No. 84-114

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KENNETH R. AMIDON, DONALD H. LAJOIE
and JAMES M. ELWOOD,

Petitioners

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE,
JOHN F. LEHMAN, JR., SECRETARY OF
NAVY, and ADMIRAL THOMAS M. HAYWARD,
CHIEF OF NAVAL OPERATIONS,

Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Government has filed a Brief in which it argues that for a variety of

stated reasons the petition for a writ of certiorari should be denied. In contrast to the position it has taken in Spencer v. NLRB, No. 83-981 (cert. denied April 16, 1984) and Jarboe-Lackey Feedlots, Inc. v. United States, No. 83-1916, the Government no longer disputes the existence of a conflict in the circuits over the meaning of the phrase "position of the United States" as used in the Equal Access to Justice Act ("EAJA") 28 U.S.C. § 2412(d)(1)(A). The Government does argue, however, that the decision of the Fourth Circuit was correct; that resolution of the conflict would not affect the results in these cases; that because of pending legislation supporting the position urged by petitioners, this Court should decline to exercise its jurisdiction; that the Fourth Circuit did

not engage in improper fact-finding because there were no facts in issue; and that petitioners failed to raise before the Fourth Circuit, the third issue presented for review by this Court.[1/]

1/ The Government also suggests by footnote that review is unwarranted for the additional reasons that (1) the District Court erroneously rejected the Government's argument that the applications of Amidon and Lajoie were untimely and (2) EAJA does not apply in habeas corpus actions. The District Court's ruling on the timeliness issue is consistent with this Court's construction of the term "final judgment," in Bradley v. Richmond School Board, 416 U.S. 696 (1974), the decision of the Seventh Circuit in McDonald v. Schweiker, 726 F.2d 311 (7th Cir. 1983) and the clear Congressional intent. See Senate Report, infra, at page 14. In regard to the applicability of EAJA to these habeas proceedings, that is not an issue here, never having been raised by the Government in either the district court or the court of appeals. Moreover, these are not prisoner cases or in any way civil/criminal hybrid cases as in Boudin v. Thomas, 732 F.2d 1107 (continued)

I. The Decision Of The Fourth Circuit Was Not Correct

In urging that the decision of the Fourth Circuit was correct, the Government has conveniently chosen to rely on a Brief which it filed with this Court in July to support its argument that "position of the United States" is limited to the Government's litigation position. By doing so, the Government has treated in ostrich-like fashion the Report of the Senate Judiciary Committee on S.919, the Senate Bill to amend and reenact EAJA, S.Rep. No. 586, 98th Cong., 2d Sess. (August 9, 1984) ("The Senate Report").

The Senate Report eradicates any lack of clarity as to Congressional intent in

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(2d Cir. 1984). Finally, these cases could have been brought as equity or mandamus actions. See Taylor v. United States, 711 F.2d 1199 (3d Cir. 1983).

the original legislative history. As this Court noted in Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980):

> While the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, Teamsters v. United States, 431 U.S. 324, 354, n. 39 (1977), such views are entitled to significant weight, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974), and particularly so when the precise intent of the enacting Congress is obscure.

See also Bell v. New Jersey and Pennsylvania, 103 S. Ct. 2187, 2193 (1983).

The following portions of the Senate Report are instructive:

> During the hearing process a number of legitimate issues were raised regarding the interpretation or misinterpretation of the EAJA. In addition to making

the law permanent, with an eye toward clarifications. Senators Grassley and Heflin proposed the following revisions which the Judiciary Committee then adopted.

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Clarifying that "position of the United States includes the underlying agency conduct which led to the litigation."

Senate Report at page 5

Three years of litigation under the EAJA have resulted in conflicting determinations over the construction of the term "position of the United States" necessitating clarification.

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[T]he approach that is the most faithful to the aims of the EAJA is one that evaluates both the agency's underlying posture that led to the litigation and the actual litigation conduct of the government. The Committee explicitly

> recognizes this in Section 2412 of the bill and thus clearly resolves any ambiguity that existed heretofore.

Senate Report at pages 7-8.

> Through this clarification the Committee specifically adopts the interpretation of the Third and Ninth Circuit Courts of Appeal [concerning] the definition of the "position of the United States." These courts have reasoned that the government position that must be evaluated includes in addition to the litigation stance, the underlying government action giving rise to the litigation.

Senate Report at page 17.

These cases present the quintessential fact situations which precipitated enactment of the EAJA. The Fourth Circuit held "that the Government was substantially justified in seeking a judicial resolution of the questions."

730 F.2d 949, 953 (4th Cir. 1984) (Pet. App. p. 5a). The Government never sought a judicial resolution. The Navy merely arrogated to itself and exercised power which it had never been given by Congress and which was in direct derogation of its own operative regulation. By the exercise of this power, the Navy required Petitioners whom the Navy was involuntarily detaining in Spain to obtain counsel thousands of miles away and to judicially challenge this clearly unlawful conduct. The Fourth Circuit noted that "[t]he Government failed, of course, to consider that it lacked the authority to hold the men. . . ." 730 F.2d at 953 (Pet. App. p. 56). A finding that a governmental department is "substantially justified" in taking an action without even considering whether it has authority

to do so, is grossly erroneous.

II. Resolution Of The Conflict Would Clearly Affect The Result In This Case

In Spencer v. NLRB, No. 83-981 (cert. denied April 16, 1984), Morris Mechanical Enterprises, Inc. v. United States, No. 83-1903 and Jarboe-Lackey Feedlots, Inc. v. United States, No. 83-1916, fees and expenses were denied in the trial courts. Indeed, in Spencer, the district court found that the Government's position was substantially justified at both the administrative and judicial stages of the controversy. 548 F.Supp. 256, 262 (D.D.C. 1982). In Morris Mechanical Enterprises, the Federal Circuit specifically addressed the pre-trial position of the parties. 728 F.2d 497, 499 (Fed. Cir. 1984). In Jarboe-Lackey, the only underlying action

was the decision to initiate the litigation. See Brief for the United States In Opposition (No. 83-1916) at page 9.

Here, when considering prelitigation events the District Court awarded fees. The Government argued to the Fourth Circuit that the District Court had committed material and reversible error because it considered the Government's underlying action. The Fourth Circuit agreed with the Government's argument that "position of the United States" was limited to the litigation position. The Government's argument now that consideration of the Government's prelitigation position would not change the result is directly inconsistent with its argument before the Fourth Circuit and plainly wrong. The Navy's basis for extending the enlistments and the Navy's

interpretation of the custody provisions of the Implementing Agreement were markedly different than the post hoc rationalizations of Justice Department attorneys during litigation.2/

III. The Pendency Of Clarifying Legislation Is No Reason To Deny Certiorari

The Government makes the anomolous argument that because there is pending legislation which would clarify the

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2/ Indeed, it is fundamental that the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination. Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 631 n.31 (1980). Agency action cannot be sustained on post hoc rationalizations supplied during judicial review. See Tabor v. Joint Board for Enrollment of Actuaries, 566 F.2d 705, 709-710 (D.C. Cir. 1977).

meaning of the phrase "position of the United States" in the manner urged by petitioners, this Court, in deference to Congress, should decline to review a decision of the Fourth Circuit which frustrates what is now clear Congressional intent. It is respectfully submitted that deference to Congress in the event of passage of this legislation would be effected by remand for reconsideration in light thereof. This course of action in light of new legal developments is well-grounded in precedent and indeed was taken by this Court when the EAJA was initially enacted. East Baton Rouge Parish School Bd. v. Knights of the Ku Klux Klan, Realm of Louisiana, 454 U.S. 1075 (1981).

IV. There Were Disputed Facts Unresolved In The Underlying Litigations

The Government argues that there were no material facts in issue. This contention is patently inaccurate; it was made in the District Court in all three cases and was uniformly rejected. In the Amidon case, the District Court recognized that there were factual disputes, but viewed disputed facts in the light most favorable to the Government. (Pet. App. p. 44a). Contemporaneous with the entry of summary judgment in favor of Amidon, the District Court entered an Order on June 22, 1981 in the Lajoie case, providing in pertinent part as follows:

> In consideration of the respondents motion for summary judgment and the petitioner's renewed motion for an evidentiary hearing, it is ORDERED that the respondents' motion is

> denied and the petitioner's motion is granted on the grounds that there are material issues of fact in dispute, and an evidentiary hearing is ORDERED to consider whether the respondents' decision to retain petitioner at the Naval Station in Rota, Sptain, was proper under Orloff v. Willoughby, 345 U.S. 83 (1952) and Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971).

Lajoie's enlistment expired, however, before the hearing, and on the basis of its decision in Amidon, the District Court entered judgment in favor of Lajoie viewing the disputed facts in the light most favorable to the Navy.

Finally, in Elwood, upon the petitioner's motion for permission to take discovery pursuant to 28 U.S.C. § 2243 and the holding of Harris v. Nelson, 394 U.S. 286 (1969), the District Court on February 12, 1982, determined that

discovery was appropriate to elicit facts necessary to help the Court "dispose of the matter as law and justice require." The initial wave of discovery only had been provided when summary judgment was entered as a matter of law upon the decision of the Fourth Circuit in Amidon. Some of the relevant facts in issue are set forth at pages 58a-72a of Petitioner's Appendix.

In connection with substantial justification analysis, the claimed position of the United States is not supported by the testimony or affidavit of any official of the Department of Defense or Department of the Navy, is contrary to the stated causes of detention in the habeas returns, and is contrary to the Navy's operative regulation and its actual interpretation of the custody obligations

in these cases. The Fourth Circuit clearly erred in engaging in fact-finding.

V. The Third Issue Presented For Review Was Clearly Raised In The Court of Appeals

The Government opposes consideration of the third issue presented by Petitioners because of "petitioners' failure to raise this point before the court of appeals" (Respondent's Brief, page 8). This contention is simply not true and the cases cited are clearly inapposite.

First and significantly it must be remembered that petitioners were appellees before the Fourth Circuit. Second, petitioners did specifically raise this issue at pages 17 through 18 of their Brief. Third, the Respondents recognized

that this issue was raised and addressed it at page 7 of their Reply Brief. Finally, when the Fourth Circuit determined ab initio that the litigation position of the United States had a reasonable basis in law, but addressed only one challenge, petitioners raised this issue with supporting precedent in two pages of their Petition for Rehearing (Petition For Rehearing, pages 11 and 12).

Although clearly raised the issue was not addressed or decided by the Fourth Circuit. This deficiency does not suggest that review by this Court would be inappropriate, but rather that disposition of the merits of the issue by this Court should await consideration of the issue by the court of appeals. Under such circumstances the appropriate response

would be to remand.

VI. Conclusion

For the reasons set forth above together with those presented in their petition, Petitioners respectfully submit that the Petition For A Writ Of Certiorari should be granted. It is particularly appropriate for this Court to address the proper interpretation of "position of the United States" where subsequent to the Senate Report clarifying Congressional intent, circuits continue to frustrate that intent by addressing only the Government's litigation position. See,

e.g., Ashburn v. United States, No. 83-7467 (11th Cir., Aug. 28, 1984).

Respectfully submitted,

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